No. 20879

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. J. Lison Company, Inc.,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

Sweeney, Cozy & Foye,
By M. J. Diederich,
639 South Spring Street,
Suite 405,
Los Angeles, Calif. 90014,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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PETITIONER'S OPENING BRIEF.

Jurisdiction.

This case is before the Court upon petition of R. J. Lison Company, Inc. pursuant to Section 10 (f) of the National Labor Relations Act, as amended, for review of an order of the National Labor Relations Board, issued March 29, 1966. The decision of the Board and order are reported at 157 NLRB No. 37. This court has jurisdiction of the proceedings as the unfair labor practices charged were alleged to have been engaged in at Burbank, California, where petitioner transacts its business. The National Relations Board in its answer to the Petition For Review admits the jurisdiction of this court. No jurisdictional issue is presented in this case. Section 10 (f) is found in 61 Stat. at page 143.

Statement of the Case.

The gravamen of the complaint filed in this case was that petitioner eliminated all overtime for, and later discharged, its employee, Stuart Taber, and discharged its employee, Curtis Reed, because each had engaged in union activity. Petitioner's answer controverted these allegations. Hearing was held in Los Angeles, California on October 5 and 6, 1965 before Howard Myer, Trial Examiner.

A Trial Examiner's Decision, dated December 29, 1965, sustained in full the allegations of the complaint, and among other things, recommended reinstatement with back pay for Stuart Taber and Curtis Reed. Petitioner filed exceptions to the decision and a brief in support thereof.

A Decision and Order of a three member panel of the Board, dated March 29, 1966, adopted the findings, conclusions and recommendations of the Trial Examiner, with one modification: contrary to the Trial Examiner, the panel found the evidence insufficient to support the finding petitioner had eliminated Taber's overtime work for a discriminatory reason. The Trial Examiner, in his decision, had found "that the elimination of Taber's overtime work at premium pay on and after October 30, 1964, was also violative of Section 8(a) (3) and (1) of the Act," but there was nothing in the record to show petitioner had any knowledge of Taber's union activity prior to the elimination of the overtime work.

Petitioner sells and services power sweepers, principally as a franchised dealer for Wayne Sweeping Equipment [TR 118].[1]

[1]TR refers to the Reporter's Transcript of the hearing.

As part of its service business, it provides maintenance service to about 1000 customers [TR 116, 198].

In the summer and early fall of 1964, its service work force consisted of four mechanics, one driver, one parts man and a service manager.

Curtis Reed was one of the mechanics. Stuart Taber was the parts man.

In July of 1964, its service facilities had been moved into a new building and Stuart Taber was assigned the additional task of watering a newly planted landscape. This required some overtime on his part.

On October 30, 1964 Peter McGrath, petitioner's general manager, told Taber to stop the watering and not to work any more overtime because the weather had cooled and the landscaping had become established [TR 127]. This eliminated Taber's overtime.

Pursuant to a consent election held by the Board, the union was certified as the bargaining agent for petitioner's service employees on November 13, 1964. The union had won the election, held on November 4, 1964, by a six out of six vote.

In about June of 1964, McGrath and Taber began having discussions about Taber's work load [TR 75]. Basically, Taber wanted to drop some "chain and flap" work he was doing [TR 77, 78, 79]. The last conversation took place sometime in October of 1964.

Taber claimed McGrath agreed he needed help. McGrath claimed he had said he would talk to Lison [TR 80] or Sheldrick [TR 94] about it. R. J. Lison was the president and Sheldrick the service manager for the company.

One of Taber's duties was to maintain inventory control cards. Petitioner stocks about 2500 different types of parts [TR 120]. There are few parts of which more than 5 are carried and some of which only 1 is carried [TR 121]. Inventory control cards were used in order to maintain an adequate supply of each part. A card was kept for each part showing the number presently in stock. The running balance on the card for each part was kept current by adding to it if a new part came into stock or subtracting from it if a part was used or sold.

Taber claimed he told McGrath he could not maintain the inventory control cards and McGrath did not dissent [TR 94]. McGrath claimed he simply told Taber to let the cards go for a while and catch up on them later [TR 148].

In the fall of 1964, petitioner's service business began to decline [TR 128]. On November 6, 1964 petitioner advised the union by letter that it would be necessary to terminate one man because of a lack of business. The union did not reply to the letter [TR 129, R-1].[2] In the middle of November, the truck driver, Holman Cluck, was terminated.

On December 2, 1964 petitioner advised the union by letter that it would be necessary to terminate another man because business continued to decline [TR 132, R-2]. Again, the union did not reply to the letter.

The decision to terminate a second employee was made in early December, however, Mr. Lison suggested

[2]R refers to Respondent's Exhibit.

waiting to terminate the man until after Christmas [TR 132].

The task of selecting the second man was left to Sheldrick [TR 177]. He suggested Curtis Reed, who was terminated on December 31, 1964.

On January 22, 1965 Lison discovered Taber had not been maintaining the inventory control cards or taken the September 30, 1964 inventory [TR 209]. In a very upset state he fired him.

General Counsel's position was that Taber's overtime was eliminated because of his union activity and that he was discharged for his union activity. As noted, the Trial Examiner sustained this position.

The Board panel adopted the Trial Examiner's findings, except it eliminated the finding Taber's overtime had been eliminated for an illegal purpose.

The initial question presented is whether there is substantial evidence on the record considered as a whole to support the findings that Stuart Taber and Curtis Reed were discharged because each had engaged in union activities.

> *Universal Camera Corporation v. NLRB,* 340 U.S. 474, 71 S. Ct. 456.

A second question is whether the remedy ordered is proper, if such substantial evidence does exist.

Other questions are encompassed within the intitial question.

Are the credibility resolutions supported by the evidence?

Did the Board err in considering and attaching significance to an expression of opinion allegedly made by R. J. Lison, which statement contained no threat of reprisal or force?

Did the Board err in considering and attaching significance to a statement made by Richard Sheldrick in jest?

Did the Board err in finding that petitioner advanced shifting reasons for the discharge of Reed?

Specification of Error.

Petitioner contends the Board erred in finding that Stuart Taber and Curtis Reed were discharged because each had engaged in union activity.

Petitioner contends the remedy ordered is not proper.

Petitioner contends the evidence does not support the credibility resolutions.

Petitioner contends the Board erred in considering and attaching significance to the statement allegedly made by R. J. Lison to Richard Lee.

Petitioner contends the Board erred in attaching significance to a statement made by Richard Sheldrick in jest.

Petitioner contends the Board erred in finding that petitioner advanced shifting reasons for the discharge of Reed.

Argument.

The Trial Examiner found that petitioner eliminated Taber's overtime on October 30, 1964 because of his union activity.

However, on that date, petitioner had no knowledge Taber was in any way involved with the union.

The election did not take place until November 4, 1964.

Sheldrick is alleged to have overheard Reed announce that a union meeting was to be held in Taber's house, but this was three weeks after the election.

Richard Lee (union organizer) was supposedly seen talking to Taber, but this was on January 22, 1965.

Lison is supposed to have said to Lee that except for Taber and Reed, bargaining would not be necessary, but this was in late December of 1964.

Each of these events took place after October 30, 1964.

True, the Board did not adopt this finding of the Trial Examiner, but it is mentioned at the outset as being indicative of the Trial Examiner's understanding of "substantial" evidence.

In *Universal Camera Corporation v. NLRB,* 340 U.S. 474, at page 488, the Supreme Court said:

> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is *substantial,* when viewed in the light that *the record in the entirety* furnishes, including the body of evidence opposed to the Board's view (Emphasis added).

Petitioner here contends there is no substantial evidence on the record as a whole to support the finding Taber was discharged for union activity. Proof that raises mere speculation, suspicion, surmise, guess or conjecture is not substantial evidence. *Local No. 3, United Packinghouse Workers, CIO v. NLRB,* 210 F. 2d 325 (8th Cir. 1954).

Marshalling all of the evidence on the discharges of Reed and Taber, we find that General Counsel presented evidence as follows:

1. On November 4, 1964 six men out of a six man unit, which included Taber and Reed, voted for the union.
2. Two days prior the the election, McGrath read a speech to the employees [TR 152-153, R-4].
3. About three weeks after the election, Sheldrick made a comment to Reed about a picket sign [TR 29].
4. About three weeks after the election, Reed, within hearing of Sheldrick, announced there would be a union meeting at Taber's house [TR 29].
5. In late December of 1964, Lison told Lee they would not be bargaining except for Reed and Taber [Tr. 12].
6. Sheldrick saw Lee talking to Taber on January 22, 1965 [Tr 17].
7. Reed was terminated on December 31, 1964 and Taber on January 22, 1965.

This is the sum and substance of General Counsel's evidence that petitioner discharged two of its employees with an unlawful intent. Basically, all that it infers is

that petitioner knew Reed and Taber supported the union and that they were discharged.

It is submitted the Board panel erred in finding petitioner had violated the Act on the basis of this meager evidence. The General Counsel had the affirmative duty to produce substantial evidence that the discharges were unlawfully motivated. All that was produced was evidence that raised suspicion and called for speculation. See *NLRB v. Rickel Bros. Inc.*, 290 F. 2d 611, 3rd Cir. (1961) for a case similar to this.

Actually, under Section 8(c) of the Act, the Board panel erred in even considering McGrath's speech and the comment Lison allegedly made to Lee in late December of 1964. See *NLRB v. Mt. Vernon Telephone Corporation*, 352 F. 2d 977 (6th Cir. 1965) where at page 979, the court said:

> The National Labor Relations Act specifically provides that the expression of any views shall not be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. 29 U. S. C. Section 158(c). There is nothing in the above statements to indicate that they had the effect of coercion, threat of reprisal, or promise of benefit. They were made in the exercise of free speech and as such have no evidentiary value as an unfair labor practice. *NLRB v. Tennessee Coach Co.*, 191 F. 2d 546 (6th Cir. 1951).

The Board panel also erred in attaching significance to Sheldrick's statement to Reed which Reed, on cross-examination, admitted had been made in jest [TR 59].

On the other hand, there was substantial proof that petitioner did not discharge Taber and Reed for an unlawful reason.

First of all, there is no evidence at all of any union hostility on the part of the petitioner.

The union filed its petition for an election in early August of 1964 [TR 8].

Petitioner consented to the election [TR 8].

The election was held on November 4, 1964 [TR 8].

Between August 13 and November 4, petitioner's campaign consisted of one meeting at which McGrath read a speech [TR 151-152].

The concluding paragraph in that speech advised the employees they could "vote the way you want".

After the election, petitioner recognized and bargained with the union. There was no rejection of the union as the bargaining representative or of the bargaining process [TR 154].

Not a single factor is present in this case which the Board and the courts have always considered important in wrongful discharge cases. In fact, this writer has not been able to find a case where a discharge was held illegal where the only evidence was that the employer knew the employee supported the union.

The discharges did not take place immediately after the discovery of union activity as in many wrongful discharge cases.

Petitioner has never hired replacements for Reed and Taber [TR 161-162]. In *NLRB v. Mt. Vernon Tele-*

phone Corporation, 352 F. 2d 977 (6th Cir. 1965), at page 980, the court said:

> There is substantial evidence to support respondent's position that the fourth man was not needed in the switchroom, and that operations were effectively carried on with only three men. With four men in the switchroom they were idle at times. Sanford's job was never refilled since his transfer to cable helper on July 25, 1962. This is strong evidence of the economic justification for his transfer.

There was no evidence of illegal interrogation of employees as in many wrongful discharge cases.

There was no evidence petitioner was hostile toward the union. See *NLRB v. Chicago Perforating Co.*, 346 F. 2d 233 (7th Cir. 1965), where at page 236, the court said:

> On the contrary, while respondent evidently was surprised and perhaps displeased with the prospect of a union in its small plant, operating at a little profit, there is no suggestion of anti-union background, that it failed to acquiesce in the result and recognize the union as the bargaining agent for its employees.

There was no evidence petitioner departed from company policy regarding a reduction in work force as in many wrongful discharge cases.

There was no evidence Taber or Reed had been given recent wage increases. Reed had not received a raise for six months before his discharge [TR 228-230].

No employee had ever been threatened for his union activity as in almost every wrongful discharge case.

There was no evidence of unlawful surveillance of union activities as in many wrongful discharge cases.

Petitioner had no history of other unfair labor practices as in many wrongful discharge cases.

In short, none of the indicia of a wrongful discharge is present in this case.

In contrast to the speculative evidence adduced by General Counsel, petitioner presented positive, overbearing evidence that both Taber and Reed were discharged for cause.

A decision was made in early December to terminate a second man because of a decline in service business. Petitioner communicated that decision and the reason for it to the union on December 2, 1964 [TR 131-133, R 2]. At the hearing, no one questioned the assertion business had been declining.

It is submitted Reed's deportment as an employee justified his selection as the man to terminate. He was a poor employee.

He had been shaving on company time for about a year and a half [TR 34]. None of the other mechanics shaved on the job [TR 53].

He habitually was late for work [TR 48].

Other mechanics reported for work in their uniforms, but he changed into his on company time [TR 37-38].

There were complaints from customers about his work, and Sheldrick did speak to him about them [TR 52].

A customer had complained he was sleeping on the job, and Sheldrick did speak to him about it [TR 50-51].

Sheldrick, himself, had found him asleep on the job on two different occasions [TR 179-180].

There was ample cause for selecting Reed. Sheldrick, who made the selection, denied union activity entered into it [TR 181]. Lison believed Reed was not a strong union supporter because Reed had bragged about crossing a picket line [TR 215].

Taber's discharge was spontaneous. Taber did not deny he had failed to maintain the inventory control records. Lison believed he had neglected his job, became angry, and fired him.

The language of the court in *NLRB v. McGahey,* 233 F. 2d 405 (5th Cir. 1956), at page 412, is particularly appropriate in this case:

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, naught remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second guess it or give it gentle guidance by over the shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but

> one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. (Citations omitted).

Petitioner also attacks the crediting of testimony by the Trial Examiner, as adopted by the Board panel. See *NLRB v. Mount Vernon Telephone Corporation,* 352 F. 2d 977 (6th Cir. 1965), at page 979:

> It is clear that the crediting of a witness by a Trial Examiner is entitled to great weight by a reviewing court, but it is also true that the crediting is not conclusive on the court. The court may choose not to be bound if it believes that the crediting was improper.

The Trial Examiner consistently credited the witnesses for General Counsel and discredited those for petitioner, even though petitioner's evidence was in most instances of a positive nature and corroborated by other facts and circumstances.

For example, petitioner's evidence was that Reed was an unsatisfactory employee. Sheldrick was able to give specific instances of complaints he had received.

Robert Lopez, a member of the six-man unit, who substituted for Sheldrick during his vacation period, related he had received a complaint from a customer which he related to Reed [TR 220-221].

Reed himself acknowledged Sheldrick had spoken to him about customer complaints and sleeping on the job.

Reed was a biased witness because of his financial interest in the outcome of the hearing. The refusal to follow the Trial Examiner in crediting testimony where it conflicts with well-supported and obvious inferences

from the rest of the record is proper, particularly so where the testimony in question is given by an interested witness and relates to his own motives. *NLRB v. Pyne Molding Corporation,* 226 F. 2d 818 (8th Cir. 1955).

The Trial Examiner credited Reed's testimony in the face of his obvious attempts to misstate the evidence.

On direct examination, Reed testified he had a "conversation" with Sheldrick concerning the union and that Sheldrick told me that we "should get the right colored picket signs, so it wouldn't clash with the building if we went union" [TR 28-29].

On cross-examination, he admitted Sheldrick had made the statement in a joking manner [TR 50].

The Trial Examiner attached significance to the statement.

On direct examination, Reed testified union meetings were held at Taber's house, "across from the plant", intimating surveillance was possible.

On cross-examination, he admitted Taber's house was a block and a half from the plant [TR 45-46].

Reed testified he had received periodic raises during the period of his employment [TR 26].

In reality he had not received a raise for six months before he was discharged [TR 228-229].

Reed testified that Lison had told the employees in a speech they would be replaced if the union won the election [TR 56].

In fact, it was McGrath who read the speech and it contained no such threat [TR 60; R 4].

In spite of all of this overstepping, the Trial Examiner chose to credit Reed.

The Trial Examiner was not consistent in his reasons for crediting one witness and discrediting another. While Lee spoke with "candor" when he admitted he could not recall specific words [p. 3, lines 51-53 of Trial Examiner's Decision] Sheldrick was made to look the buffoon when he could not recall a lot of details [p. 6, lines 1-10 of Trial Examiner's Decision].

The Trial Examiner credited evidence which disclosed Reed had never been reprimanded [p. 4, lines 14-17 of Trial Examiner's Decision]. Yet Reed himself admitted Sheldrick had spoken to him about customer complaints and sleeping on the job [TR 49-51, 52].

The Trial Examiner was not justified in placing significance on the fact Reed had not been told he would be discharged if the complaints continued. The Trial Examiner was not justified in eliminating from consideration Reed's many shortcomings as an employee. See *NLRB v. Rickel Bros. Inc.,* 290 F. 2d 611 (3rd Cir. 1961).

The Trial Examiner attached much significance to the claim of Taber that he had too much work to do. He ignored the testimony of Sheldrick and McGrath that he did not. He ignored the uncontroverted evidence that Taber was doing less shipping in October of 1964 than when he first went to work [TR 89; R 6].

In any event, whether Taber had more work to do than he could handle, and whether McGrath promised him assistance, are not pertinent. That was management's business.

Again, the Trial Examiner credited evidence about which General Counsel's witnesses did not testify. He found McGrath had promised Taber to do something

about his work load [p. 8, line 16 of Trial Examiner's Decision]. McGrath denied any such promise and when Taber was discharged, he did not accuse McGrath of *agreeing* to anything. His words to McGrath were, Didn't I *ask* you for an assistant [TR 70].

The Trial Examiner misconstrued the evidence in finding that petitioner advanced various reasons for Reeds' discharge [p. 9, lines 24-34 of Trial Examiner's Decision]. Petitioner advanced only one reason for the discharge of Reed, an economic one. That reason was clearly spelled out in its letter of December 2, 1964 to the union. It was adhered to during the hearing and in the brief. The fact that more than one reason was stated for selecting Reed as the man to terminate does not mean petitioner changed its position.

The Trial Examiner placed great reliance upon Lison's alleged statement to Lee during a bargaining session that "if Curt Reed and Steward Taber hadn't been around why, there wouldn't be any union. If it wasn't for them, why, we wouldn't be sitting here today".

As noted, that statement of opinion is not coercive or threatening and cannot be considered as evidence of an unfair labor practice.

But over and above that, Lison denied making the statement.

In support of Lison's denial, it does not seem likely that, if an employer had already decided to discharge an employee for union activity, he would blurt out something to expose his illegal plan to the union representative before the discharge. Such a statement is totally inconsistent with petitioner's acceptance of the union and its lack of hostility toward the union.

The Trial Examiner credited Lee and discredited Lison on this point on the basis of demeanor. Lison, he said, "gave the impression that he was studiously attempting to conform his testimony to what he thought was to the best interest of" petitioner, while Lee gave the impression he was "a person who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was actually said on that occasion" [p. 3, footnote 8 of Trial Examiner's Decision].

This indictment of Lison was based upon his utterance of three words, "I did not". He was asked if he had ever made such statement and he answered "I did not" [TR 214].

It is submitted such a simple, direct statement does not lend itself to the critical analysis accorded it by the Trial Examiner.

The Trial Examiner implied Lison's denial was not worthy of belief because McGrath did not corroborate it, but the absence of cumulative evidence alone does not discredit sworn testimony.

Petitioner submits the credibility resolutions of a Trial Examiner are unworthy when based upon mere form and "boilerplate" language.

A Trial Examiner's findings are not to be given more weight than they deserve in reason and in the light of judicial experience. *NLRB v. Florida Citrus Canners Cooperative,* 288 F. 2d 630 (5th Cir. 1961).[3] *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496.

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[3]Case reviewed and remanded by Supreme Court. Enforcement again denied in case reported in 311 F 2d 541.

It has been the experience of this writer that it is a rare occasion when in the trial of a contested matter, it is so obvious that one side is speaking the truth and the other is not.

Cited below are three other decisions in other cases of the Trial Examiner given at or about the time of the decision in this case:

Transonic, A Division of Genisco Technology, Case No. 31 C.A. 23;

United Nuclear Corporation, Case No. 28 CA 1138;

The Boy's Market, Inc. and Food Employers Council, Case No. 21 CA 5891.

In each of these cases is found the same "boilerplate" language regarding the credibility of witnesses. See Appendix.

Petitioner submits credibility resolutions based upon mere form and meaningless language are unworthy.

The Board undoubtedly has access to all of the decisions rendered by this Trial Examiner within a reasonable period of time near the issuance of his decision in this case. Petitioner does not, but petitioner challenges the Board to state in its reply brief how many decisions were rendered by the Trial Examiner during such a period, and in how many of those did the Trial Examiner find that one side's witnesses "studiously attempted to conform their testimony to what they felt to be their best interest", while, on the other hand, the other side's witnesses "appeared to be careful with the truth and meticulous in not enlarging their testimony beyond their memory of the facts".

Conclusion.

Petitioner submits there is not substantial evidence to support the findings that Curtis Reed and Stuart Taber were discharged for union activity or support and that the record, as a whole, discloses cause for the discharge of each of them.

Petitioner requests this court to make and enter its decree setting aside the Decision and Order of Respondent and dismissing Respondent's cross-petition for enforcement.

Respectfully submitted,

SWEENEY, COZY & FOYE,
By M. J. DIEDERICH,
Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

M. J. Diederich

APPENDIX.

Appendix Page 1

Page 13, Trial Examiner's Decision
in The Boys Markets, Inc.
(Howard Myers), dated June 18, 1965
See Brackets

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Freed testified that in the forepart of September 1963, Gus De Silva and Madray called upon her regarding the discharge of Neal Nutzman, a Crenshaw store snack bar operator and a Local 770 member, that after the Nutman had been disposed of Gus De Silva and Madray "mentioned that they had given some cards to the employees and talked to them, but they did not tell me that they had them signed and all of the people signed them"; and that at no time prior to April, 1964, did McKinstry tell her that Local 770 had received signed autorization cards from any snack bar employee.

In the light of the undersigned's observation of the conduct and deportment of Freed, Madray, McKinstry, and Gus De Silva while they were on the witness stand, and after a very carefully scrutiny of their testimony, the undersigned finds that Madray's, McKinstry's, and Gus De Silva's versions of their respective conversations with Freed, as epitomized above, to be substantially in accord with the facts. This finding is based mainly, but not entirely, on the fact that Madray, McKinstry, and Gus De Silva each impressed the undersigned as being one who is careful with the truth and meticulous in not enlarging his or her testimony beyond his or her actual memory of what was said and what was done. On the other hand, Freed gave the undersigned

the distinct impression that she was studiously attempting to conform her testimony to what she considered to be in the best interests of Boy's and the other respondents.[15]]

Under date of January 8, the Joint Board wrote Boy's that it represented "the majority of the unrepresented employees employed in the snack bar of The Boy's Markets, Inc., located within Southern California. The letter concluded with a request for recognition as the collective bargaining representative of the employees in the above-mentioned unit and for a meeting for the purpose of negotiating a bargaining contract.

After the receipt of the forementioned Joint Board letter, Boy's hired the accounting firm of J. R. McKnight & Associates, to conduct a card check.

Under date of January 14, 1964, Winston R. Grein of the McKnight firm wrote Boy's as follows:[16]

> In Response to your request I arrived at your office at 10:00 a.m. this morning to perform a card check. You gave me a sheet of paper with twenty one names typed thereon. Mr. Meister of the Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, gave me a group of cards which represented requests by certain of your employees to join his union and designate it as their collective bargaining representative.

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[15]This is not to say that at times Madray, McKinstry, and Gus De Silva were not confused on certain matters or that there were not variations in their objectivity and convincingness. But it also should be noted that the candor with which each of them admitted, during their searching examinations, that they could not be certain as to dates, times, or the exact words used, only serves to add credence to what a careful study of their testimony shows what they honestly believed to be the facts.

[16]A copy of this letter was forwarded to Meister of the Culinary Workers.

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Page 14, Trial Examiner's Decision
in United Nuclear Corporation
(Howard Myers) dated Jan. 18, 1966

See Brackets

. . . speech between the two of us. He'd say "Come on, Smitty, tell me something." "Hell, the only thing I know is coming from the miners, you let me know what is happening now." And that was just about a standard procedure with us as to conversations we got into. Again referring to the fact that you thought that I said there would be no transferring if the union came in, the Company had just got through transferring a bunch of men during that time from the Sandstone Mine to the Rare Metals Mine. They transferred union men there, and in the event of the close down, I still don't believe, I'll say in nineteen or twenty minutes, I honestly didn't believe that if there was a union in there that they wouldn't transfer the men.

> Q. You say at that time the Company had just got through transferring some men to the Rare Metals Mine? A. Well, in the vicinity of that, yes. Transferred the men from the Sandstone Mine to the Rare Metals Mine.
>
> Q. Rare Metal Mine is also the same mine known as the San Mateo Mine? A. Yes.

In the light of the undersigned's observation of Lilly, Fowler, Smith, Dominguez, Lassiter, Cummings, Gallegos, and Velarde, while each was on the witness stand and after a very careful examination of the entire record, the undersigned finds that Lassiter's, Cummings', Gallegos', Dominguez' and Velarde's versions

of their respective talks with Lilly, Fowler and Smith, to be substantially in accord with what was said. [This finding is based mainly, but not entirely, on the fact that Lilly, Fowler, and Smith each gave the undersigned the distinct impression that he was studiously attempting to conform his testimony to what he thought to be the best interest of the Respondent. On the other hand, Lassiter, Cummings, Gallegos, Dominguez, and Velarde each particularly impressed the undersigned as being one who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was said on the foregoing occasions.[21]]

On July 31, the election was held among the 135 Sandstone and Cliffside unit employees. Of the 125 employees voting, 81 cast ballots in favor of the Union and 44 against.

On August 10, the Regional Director, for and on behalf of the Board, certified the Union as the collective bargaining representative of all the employees in the agreed to appropriate unit.

On August 3, Respondent's counsel telephoned Frantz and suggested that a date be fixed for the holding of a negotiating meeting as soon as covenient. Frantz replied he wanted to wait for the Board's certification before entering into negotiations. The parties finally agreed to meet on August 17.

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[21]This is not to say that at times Lassiter, Cummings, Gallegos, Dominguez and Velarde were not confused on certain matters or that there were no variations in their objectivity and convincingness. But it should be noted the candor with which each of them admitted that they could not be certain as to dates, times or the exact words used, only serves to add credence to what a careful study of their testimony shows as to what they honestly believed to be the facts.

Appendix, Page 3

Page 15, Trial Examiners Decision
in Transonic, A Division
of Genisco (Howard Myers), dated
December 21, 1965.

See Brackets

Q. During that meeting, which was addressed by yourself and Mr. Van de Water, did you make any statement to the employees about work or work speed? A. Well, yes. We told the employees that we expected to receive for eight hours' pay eight hours of work.

Q. Did you say any more than that? A. No.

Covie Webb testified that on the same day Porter and Van de Water had addressed the employees' meeting, referred to immediately above, she asked Porter, "How long this pressure going to exist that we were working under" and that Porter replied, "As long as negotiations exist with the union." Porter testified that he had a conversation with Webb immediately after the aforesaid meeting; that he could not recall telling Webb that he intended "to keep the pressure on, . . . as long as the union was around"; and that he never "told anybody, any employee, any supervisor, or otherwise, there would be pressure kept on until the union matter was resolved."

In the light of the undersigned's observation at the hearing of the conduct and deportment of Webb and Porter and after a very careful scrutiny of the entire record, the undersigned finds that Webb's version as to what was said to her by Porter on August 18, to be substantially in accord with the facts. [This finding is

based mainly, but not entirely, on the fact that Porter gave the undersigned the distinct impression that he was studiously attempting to conform his testimony to what he believed to be the best interest of Respondent. On the other hand, Webb impressed the undersigned as being a person who is careful with the truth and meticulous in not enlarging her testimony beyond her actual memory of what was said on that occasion.]

On October 23, two days after the commencement of the strike, Respondent began notifying the strikers that they had been permanently replaced. In fact, 23 strikers were so notified prior to actually being replaced.

On November 9, the parties met in negotiations with Duncan. When Simon stated that the Union had never changed its position with respect to its demands, Downs, to quote from Downs' credible and uncontradicted testimony, "reminded Mr. Simon that he was present with Mr. Meuhle . . . when we told them at one point . . ., if Jamieson was willing to sign the agreement outlining the same provisions as [in] the agreement between the Leach Company[28] and the Machinists Union . . . we could wrap up the contract real quick" for the Leach contract "included the wage rates, which was what Mr. Meuhle had been trying to get us to look at this particular time." In response to Downs' remarks, Simon admitted remembering the meeting, remembering the discussion, and where the meeting took place. When Downs commented that Respondent "had always argued their desire to be competitive, and saying that [Respondent's proposed] wage rates had to exist . . . they never had told us who. . . ."

[28]Leach is a Los Angeles based concern with which the Union has a collective bargaining contract.